IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RICHARD P., by and for R.P.,
and DENISE L., by and for K.L.,
Plaintiffs

v. CIVIL ACTION NO. 03-390 ERIE

SCHOOL DISTRICT OF THE CITY OF
ERIE, PENNSYLVANIA, et al.,
Defendants

HEARING ON DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Proceedings held before the HONORABLE

SEAN J. McLAUGHLIN, U.S. District Judge,

in Courtroom C, U.S. Courthouse, Erie,

Pennsylvania, on Tuesday, November 1, 2005.

APPEARANCES:
EDWARD A. OLDS, Esquire, and CAROLYN SPICER
RUSS, Esquire, appearing on behalf of the
Plaintiffs.

JAMES T. MARNEN, Esquire, appearing on behalf of

the Defendants.

Ronald J. Bench, RMR - Official Court Reporter

P R O C E E D I N G S

(Whereupon, the proceedings began at 9:50 a.m., on Tuesday, November 1, 2005, in Courtroom C.)

THE COURT: Why don't we take up the issue of the motion first before we move to the settlement aspect. All right, Mr. Marnen.

MR. MARNEN: May it please the court, Mr. Olds, Ms. Russ. Your Honor, I have, as the court knows, filed a motion for partial summary judgment. The motion falls under three separate areas, general areas. One is we'd like the court to adjudicate summarily certain aspects of the Title IX claim that

has been asserted against the Erie School District.

THE COURT: It's almost in the nature, although it's a 56(d), it's almost in the nature of -- let me check my notes here. It's almost in the nature of a motion in limine, isn't it, with respect to damages?

MR. MARNEN: Well --

THE COURT: In other words, you are asking for a judicial declaration that the defendant cannot be liable for pre-assaultive conduct?

MR. MARNEN: Yes, sir. And for the assault itself.

THE COURT: And the assault itself.

MR. MARNEN: The Title IX claim, that would be the

school district alone. The Pennsylvania constitutional claims, I would also submit that neither individual defendant could be responsible regardless of the theory adopted. There's an issue here as to whether there's an affirmative duty on the part of state actors to protect private persons from the actions of other private persons. And I would submit there is no such duty.

THE COURT: Let's go backwards. Rather than start with Title IX, let's start with the equal protection claim. Do I take it that your position on equal protection is that -- first of all, that the analysis of the state ERA claim necessarily partakes of the same analysis as the federal constitutional claim?

MR. MARNEN: Yes, sir.

THE COURT: And that first and foremost, there's no evidence of purposeful discrimination in that there's no evidence that another class was treated more favorably?

MR. MARNEN: Yes. Of course to get to that point, your Honor, you have to get by the issue whether there's an affirmative duty to protect. There is an affirmative duty under Title IX, I don't think there is under the Equal Protection Clause or the -- well, the federal Equal Protection Clause and it follows because of the interrelationship analysis between state and federal, that there is no duty to protect under the equal protection or Equal Rights Amendment.

THE COURT: You're talking about the DeShaney

substantive due process principle applied to the equal protection analysis?

MR. MARNEN: Yes. There are no cases in this circuit on that issue that I located. I located a district court case out of Pennsylvania, but not out of the Third Circuit. But I think the logic pertains to equal protection, also. And that, therefore, we have -- to establish an Equal Protection Clause claim or an Equal Rights Amendment claim, it's necessary to establish an equal treatment. And there's no evidence of that. That's, in essence, my position.

THE COURT: Let's go back to the Title IX claim insofar as it relates to pre-assault and assault. Is it your position, then, that, at least for purposes of this motion, that you would concede that there are material issues of fact insofar as Title IX is concerned, as to the manner in which supervisory personnel responded or did not respond to the alleged harassing that went on post assault?

MR. MARNEN: Yes. Yes, I think we have to have a trial on that. I'm only addressing the harassment before the sexual assault and the sexual assault itself.

THE COURT: I guess I'm going to ask you to try to

prove a negative, but why aren't there material issues of fact on the first point as well?

MR. MARNEN: Because if you consider the plaintiffs'

testimony alone, for various reasons, the Title IX tests are not met. We have, of course, two plaintiffs, one as referred to in the paperwork as K.L., may I refer to her name in this proceeding or should I keep it as K.L.?

THE COURT: It's on the record and she's a minor still.

MR. MARNEN: I'll refer to her as K.L. The other one is R.P. With respect to K.L., she has complained about the conduct of three separate minors at Strong Vincent during that class year of 2001-2002. One was B.C., one was C.B., and the other was A.F. The testimony of K.L. herself indicates that B.C. called her, occasionally called her names in the hallway. And that's the extent of the harassing conduct. Granted the names called were filthy and vulgar and were sexual in nature. Namely, bitch, whore and slut, but I would respectfully submit that we don't have here conduct that is so severe, pervasive or

objectively offensive that it deprived her of access to the educational opportunities or benefits.

With respect to C.B., we have allegations that in a science class taught by Vicky Skelly, a teacher, that C.B. poked her with a pencil and tapped her on the back. That happened as she said "most days." I would submit that's not even sexual, so it couldn't be sexual harassment.

Lastly, she said A.F. followed her and made comments like "you're going to get something," which frightened her. It

wasn't sexual. None of this is severe, pervasive and objectively offensive.

With respect to R.P., on two occasions before the assault, B.C. asked her, challenged her to a fight. That's not sexual misconduct, it's not objectively offensive or pervasive or severe. Moreover, there's no evidence that the Strong Vincent or Erie School District employees knew about what was going on there.

So for various reasons the harassment of which these kids complained before the sexual assault does not meet the

various, the three-part test required by Title IX. Since it does not, then the assaults themselves cannot be the responsibility either under Title IX of the Erie School District. Because you have to be deliberately indifferent to sexual harassment of which you're actually aware, causing additional harassment. So the theory would be with respect to the assault of these kids were enabled by the indifference of the officials at Strong Vincent. Since the pre-assault harassment was not Title IX harassment, I'll call it, then there cannot be responsibility for the sexual assault, either. Or the sexual assaults which occurred in November, December, depending on who you believe.

THE COURT: Does the hostile environment, does the Title VII hostile environment analysis as to pervasiveness, severity, objective unreasonableness, inform my decision on the

Title IX side as well?

MR. MARNEN: I think it does. You're going to have different kinds of conduct with kids, as opposed to adults. But it's the same verbal test that has to be so severe,

persuasive or objectively offensive to deprive the victim of access to, in the case of Title IX, educational opportunities or benefits.

THE COURT: Let me jump ahead, I know there's a motion to amend, which isn't completely briefed up yet insofar as the IDEA claim is concerned, but it does come up in the papers. So just by way of preliminary review --

MR. MARNEN: Right now, your Honor, I think that's a Title IX claim.

THE COURT: Is that the way it's coming on, a Title IX claim?

MR. MARNEN: The amendment, motion to amend the complaint, characterizes the claim as a Section 504 claim.

THE COURT: Let me make sure, so we're not ships passing in the night, because I don't have the motion in front of me but, Mr. Olds, on this IDEA issue, what is the nature of the proposed amendment, just so I --

MR. OLDS: It was to have been a motion to assert a 1983 claim, that there had been a violation of the IDEA and the Rehabilitation Act.

THE COURT: So it's your typical 1983 claim riding

on the coattails of IDEA.

MR. MARNEN: But right now we haven't addressed that. I think Mr. Olds is characterizing the claim as it stands right now as a Title IX claim.

MR. OLDS: Without the amendment, as the case stands right now without the motion, if you disregard the motion.

THE COURT: Let's do this now, now that I oriented myself to space and time. You addressed the Title IX claim in your papers, didn't you, insofar as it relates to this issue?

MR. MARNEN: I did. But I also addressed -- when I originally filed my motion, I did not anticipate that it would be characterized as a Title IX claim. Even though there is no expressed mention of IDEA or a Section 504 in the complaint, I nonetheless took it upon myself to move to dismiss those kinds of claims based on exhaustion.

THE COURT: Why don't you do this. Hold your powder on that, then when he gets up, he can flush that out a little more and you'll have the opportunity to address it. All right, let's hear from Mr. Olds.

MR. OLDS: Your Honor, I think on the assault

itself, the first sexual assault that involved the two girls, I think that there is evidence that there was in-school harassment, but I'm not certain there is sufficient evidence to have that assault be part of the case. I think that the case --

THE COURT: Let's get ourselves oriented here. The first assault occurred when?

MR. OLDS: Well, our clients claim that the first assault occurred at the end of November, the school district claimed that the assault occurred on December 19th.

THE COURT: All right. Whenever, you concede, at least insofar as the first assault of these kids is concerned, that there wasn't sufficient notice to the school district of a threat so as to make it actionable?

MR. OLDS: That's correct.

THE COURT: So that's off the table. Now, tell me -- at what point then on the temporal time line do you contend that the school district was on notice such that all subsequent events they could theoretically be liable for?

MR. OLDS: I think that the next day Linda Cappabianca learned of the sexual encounter involving at least Kristina, and according to testimony of Rachel, also Rachel as well. So immediately after that the school district officials learned of the assault. Thereafter, there was significant harassment in the school involving both of the girls. Kristina burned herself and ended up in the mental hospital.

THE COURT: All right. What's germane to me, Mr. Olds -- hang on a second, what's germane to me, I think maybe this will move our discussion along, if you could, summarize for me from what is now a rather voluminous record, the

evidence, direct or circumstantial, which suggests that Ms. Woods and/or Cappabianca were on actual notice of this ongoing problem and in a deliberately indifferent fashion did nothing about it; tick it off for me?

MR. OLDS: Okay. Well, first of all, they both admit that Kristina told them that there was a sexual assault. There's evidence that they knew it involved oral sex. Kristina and Rachel are 12-years-old. Kristina and Rachel both

testified that they had ongoing attempts to, you know, go to Cappabianca, primarily Cappabianca, and inform her of what was going on with them and what happened. There were several incidents in the school that when they occurred, Cappabianca was aware of, for instance, the incident where Rachel was shoved down the steps and there was an attempt at a sexual assault on that occasion. And Kristina made a number of reports to them as well. They admitted in their testimony to when they talked to Richard P. they had known about the situation for a while. Cappabianca made that admission. On January 7th, Kristina's mother, this was after Kristina was in the hospital, Kristina's mother, K.L.'s mother, went to Cappabianca and told her that she had heard from her daughter that she had been sexually assaulted and that's why she was in the hospital. Even though that happened, Cappabianca didn't do anything until the Wednesday of that week. Wednesday of that week when R.P. had this outburst in school, and they started

investigating it.

THE COURT: Didn't one of the parents, the father go

to Ms. Cappabianca allegedly, per the record --

MR. OLDS: Yes. As a matter of fact, well, there had been a conversation between Cappabianca and R.P.'s father concerning that Cappabianca telling him that his daughter had a dirty mouth, that she needed to be disciplined. That happened earlier in the record. We're not, because of the uncertainty of time, we're not exactly certain when that happened. That's an actual event that actually occurred. And then you have a situation where Cappabianca had a meeting with the other parent of the friend of R.P.'s and said R.P. is, you know, having oral sex in the gym, you ought to keep your daughter away from her. So there's ample evidence that there was actual knowledge and I think that --

THE COURT: How many times did these children go -- what does the record reflect on this point. How many times did one or both of these kids go to Cappabianca individually in an attempt to tell her about this ongoing situation?

MR. OLDS: Well, I think that the evidence is that Rachel went on more than one occasion, I would say several.

THE COURT: What does she say, meaning Rachel, in her deposition as to what she told her?

MR. OLDS: She would say that when she attempted to talk about it, Ms. Cappabianca would make noise, shush her, say

don't talk about it, I know it happened, I don't want to hear about it. And wouldn't let her express what had happened to her. K.L., Kristina, told the whole incident to Cappabianca before Christmas. There's no dispute about that. Both Kristina says that Cappabianca -- well, Cappabianca admits that Kristina admitted to a sexual encounter before Christmas. Cappabianca equivocated when she said I don't, you know, I don't know if it was oral sex, she equivocated about that. C.B., the assailant, said that Cappabianca came up to him and says what did I hear about oral sex. And that all happened before Christmas. It all happened in fact the day after the assault, if you take the assault on the date the school district says --

THE COURT: Thereafter, after the assault, then there began, according to the plaintiffs, this period of harassment as a result of the assaults?

MR. OLDS: That's correct. And then plaintiffs say

that Kristina said she talked to Ms. Cappabianca on more than one occasion. Rachel says that she talked to Cappabianca on more than one occasion. And then Kristina put herself in a mental institution by inflicting harm on herself. Rachel suffered additional harassment, including a second sexual assault at the laundromat. That would be on the same day that Kristina's mother came in --

THE COURT: This is by the same children that were

involved in the original assault?

MR. OLDS: Yes. And so then --

THE COURT: When were the police first notified, I mean, in December the record reflects someone, Ms. Cappabianca, was advised of the sexual assault, is that correct?

MR. OLDS: That's correct.

THE COURT: And the parent or parents were there as well?

MR. OLDS: No, the parent came in at the beginning of January, that would be January 7th.

THE COURT: Did the child tell Ms. Cappabianca as to

the identity of the perpetrators?

MR. OLDS: Yes, because Cappabianca went and talked to the perpetrators.

THE COURT: When were the police involved, when did they become involved?

MR. OLDS: January 10th. If you accept the school district dates, it would be three weeks after Cappabianca learned about the sexual assault.

THE COURT: How were they involved and what was the impetus for their involvement?

MR. OLDS: Well, the school district, after meeting with -- the students, now see, the record is a little unclear because there is no documentary evidence of what the school district did. In their testimony they said we had two days of

investigations where we met with all the students to get to the bottom of the story. What they didn't do, they didn't meet with Rachel's father until -- if I could go by the days of the week. On Monday, the 7th, K.L.'s mother came in and said my daughter is in the hospital, she was sexually assaulted, and I

think Cappabianca told her we know about it, we're on it. That day there was a second in-school assault on R.P. And at the laundromat that night R.P. was assaulted by the same student. There was an additional incident on Tuesday, and then on Wednesday of that week, R.P. exploded. At some point on Thursday, I think it's Thursday, on Thursday the school district finally told R.P.'s father that, well, we're investigating this incident and we're going to call in the police. And the police came in the next morning. The police conducted their investigation. They didn't make any arrests initially. And in fact what happened was that R.P. and K.L. were, as of that Friday, that would be January 11th, were out of the school entirety. Their assailants, including the two male assailants, nothing was done to discipline them. And they remained in school. About two weeks later, B.C., the girl who sort of was behind it, was arrested by the police and taken out because she was intimidating other kids. C.B., the one male assailant, was removed by his parents and put into a private school. And then the other assailant, I guess the juvenile court process went on, he was taken out of the school.

THE COURT: All right, that tells me what I need to know. Let's get back to the legal parts so I can wrap this up and maybe get an order on the record. So to move off of Title IX and move to your other claim, you concede that anything, that anything prior to the first assault is not actionable?

MR. OLDS: I don't believe that we have evidence --

THE COURT: So your position would be anything that occurred, including any subsequent assaults that occurred after the first assault, that's what your claim is based on?

MR. OLDS: That's what the claim is based on.

THE COURT: Let me jump to your last claim. I understand that claim perfectly well, but I don't understand your Title IX claim insofar as it relates to IDEA at all -- the problem is probably mine, but I've never seen a claim cast that way?

MR. OLDS: Well, I think, it's not like, let's just forget about the IDEA for a second. The Title IX claim is that after the school district finally dealt with this issue, it put the two girls in an alternative educational setting, Sarah Reed school. Which was the setting that they basically, they put behaviorally disturbed kids into that setting. We considered

that a Title IX violation because the school district took out the two victims, left the assailants in school, took out the two female victims and placed them in an alternative setting, excluded them from a regular classroom. Incidentally, both of

these girls had IEPs. They were both learning support students, not behavioral support students, but learning support students.

THE COURT: Forgive me for interrupting you, but it's helpful. The amended complaint which you propose to file, is a classic 1983 claim?

MR. OLDS: Right. Well, let me see if I can tell you how we get to that point. We saw the case as a Title IX case when they excluded the girls and they put them in this alternative educational setting, in essence, punishing them for being the victims.

THE COURT: But there's no discrimination on the basis of --

MR. OLDS: If you look at the sexual activity, the males get to stay in the school district --

THE COURT: Why don't you get everything that you think you should get under a straight Title IX analysis -- you know, people always think they get something when they throw kitchen sinks into a lawsuit, but sometimes it just muddies the waters.

MR. OLDS: What the story is is that Mr. Marnen raised the issue in his summary judgment motion, saying that, well, you can't have your Title IX remedies because there's another statute here that said you had to exhaust. I mean, if you challenge this placement in this alternative education

setting, well, you had a chance to exhaust. That's what prompted us to believe that --

THE COURT: Let me ask you this. Would it be fair to say insofar as any claim is based upon a violation of IDEA, you are willing to put all your eggs in the 1983 basket, such as it's pled in your amended complaint?

MR. OLDS: Just let me -- I think that that's probably the case. I can envision --

THE COURT: Well, you don't have to envision. I'm

not trying to cut you off, because we have a settlement conference we have to get to after this. Okay.

MR. OLDS: The IDEA claim does add something --

THE COURT: One point on the IDEA claim which strikes me as a bit unusual. In most of the IDEA claims that I have handled here, they are child find cases. Where the complaint by the parents is you didn't find my child and didn't place him in a program. This is a complaint that you found my child and placed her in a program. It's the world turned on it head, isn't it?

MR. OLDS: What it is -- it's almost a coincidence that they had IEPs.

THE COURT: Most people are complaining they didn't get an IEP and didn't get placed. Your kids got an IEP and got placed, right?

MR. OLDS: That's correct. Except they were placed

and the evidence suggests that they were placed because we can't keep you safe in the school district, rather than for an educational reason.

THE COURT: Did the IEP adjudicate them with children with disabilities within the meaning of IDEA, were they adjudicated that way?

MR. OLDS: See they already had IEPs before -- what had happened was in order to change the placement from the regular school setting to this alternative education setting, this highly restrictive setting, the school district changed the IEPs. And, you know, I think yes, the case is a Title IX case. And as part, the motion to amend was defensive as opposed to offensive.

THE COURT: All right, but I'm still going to have to address the motion to amend later. The last point, equal protection. Once again, you're entitled to plead it, but you get all your remedy under Title IX. How do you have an equal protection claim here?

MR. OLDS: The equal protection claim, I agree with you, I'll concede I think Mr. Marnen was right on the DeShaney

---

issue, that that probably should apply here. There was an equal protection violation in the sense that they, Cappabianca and Woods, removed these two girls from this school. The denial of equal protection is that they, the victims, were

placed in an alternative --

THE COURT: But there's either an actionable equal protection claim or not, if you concede the liability of DeShaney, then there's not an equal protection claim?

MR. OLDS: Except for the fact that they put the kids in an alternative education setting. They said we're not going to let you stay in regular schools, we're going to put you in the alternative education setting. We're going to treat you differently because you're a victim.

THE COURT: All right. I got your point, thank you. Anything else you want to say briefly before I rule on this?

MR. MARNEN: Very briefly, your Honor. I don't know where we are on the placement issue right now, but the Sarah Reed placement issue under Title IX --

THE COURT: I think Title IX, that has been conceded. And that issue is going to come on by way of, that aspect of the Title IX claim insofar as it relates to IDEA will be taken up under a 1983 rubric.

MR. MARNEN: I can say nothing on that then. I'd just like to make clear, your Honor, the relief we're asking for here is the dismissal of Janet Woods, one of the individuals from this case. The only way she's in here is under Count Two of the Equal Rights Amendment.

THE COURT: Isn't Cappabianca in there under that as well?

MR. MARNEN: Yes, she is.

THE COURT: They would both go under that count if you're right?

MR. MARNEN: Yes, your Honor, both of them would. Cappabianca should stay in under the defamation claim. We haven't talked about that, but there's a defamation claim here. Cappabianca has to stay in for that. On the rest of it, and both of them get out on Count Two, equal protection, Equal Rights Amendment. That leaves the Title IX claim against the district only for post assault events.

THE COURT: All right, this is order.

ORDER

Presenting pending before the court is a motion for partial summary judgment filed by the defendants in the case. First, the defendant contends that the record does not raise a triable issue of fact as to the liability of the school district under Title IX for the sexual assaults and any harassment that preceded those assaults. By way of further clarification, at oral argument plaintiff concedes -- if I have this incorrectly, you correct me, Mr. Olds -- plaintiff concedes that they are seeking damages under Title IX only for harassment for assaults that occurred after the initial assault, is that correct?

MR. OLDS: That's correct, your Honor.

THE COURT: In order to state a cause of action under Title IX, it is necessary and, by the way, Title IX

involves sexual harassment of one student by another, it is necessary that evidence establish that supervisory personnel were deliberately indifferent to sexual harassment of which they had actual knowledge; that the harassment was so severe, pervasive and objectively offensive that it deprived the victim

of access to the educational opportunities or benefits provided by the school; and three, the record must reflect deliberate indifference which caused the victim to undergo harassment or made her more vulnerable to harassment. That would be Davis_v. Monroe_County_Board_of_Education, 526 U.S. 629, (1999).

Having carefully reviewed the record on this point, I find that there are material issues of fact which preclude and would render inappropriate the defendants' motion for summary judgment on this aspect of the Title IX claim. Consequently, the defendants' motion under Rule 56(d) is denied.

The defendants also move for summary judgment on the Equal Protection Clause under the Fourteenth Amendment of the United States Constitution, as well as the Equal Rights Amendment of the Pennsylvania Constitution. While the defendant concedes that the Pennsylvania ERA would support a private cause of action in the abstract, see page three of its reply brief and, parenthetically, it appears that the Third Circuit as in dictum so indicated as well, Pfeiffer_v._Marion Center_Area_School_District, 917 F.2d 779, (3rd Cir. 1990),

they contend the equal protection claim fails here as there is no evidence of purposeful discrimination as that term has been interpreted in the context of an equal protection claim. The federal equal protection claim and the state equal protection claims are analyzed in the same fashion. See Williams_v. School_District_of_Bethlehem, 998 F.2d 168,179 (3rd Cir. 1993). The defendant argues that purposeful discrimination within the meaning of the Equal Protection Clause has not been made out as there is no evidence on this record of disparate treatment, i.e., male students having been subjected to harassment who were treated more favorably than the plaintiffs. As stated in Brown_v._Borough_of_Mahaffey,_Pennsylvania, 35 F.3d 846 (3rd Cir. 1994):

> "A government action is subject to 'strict scrutiny' under the Equal Protection Clause of the Fourteenth Amendment if it discriminates against a 'suspect class' or if it interferes with a 'fundamental right'." Citing cases. "The

plaintiffs argue that the violation of their fundamental right to free exercise of religion constitutes an equal protection violation. However, in order to maintain an equal protection claim with any significance independent of the free exercise count which has already been raised, the plaintiffs must also allege and prove that they received different treatment from other similarly situated individuals or groups." Citing cases. And similarly, in Soper_v._Hoben, 195 F.3d 845, (6th Cir, 1999), the court observed:

"In order to establish an equal protection violation, the Sopers must show that Renee's complaints were treated differently by the defendant than were complaints by Renee's male counterparts." Citing cases.

Having carefully reviewed the record, I find no evidence of disparate treatment within the meaning of those previously-described cases. I find for that reason the equal protection claim in all of its contours fails.

Finally and alternatively, the defendant argues that the equal protection claim runs afoul of DeShaney. I'm

inclined to agree. In Beltran_v._City_of_El_Paso, 367 F.3d 299, (6th Cir. 2004), the court observed:

> "The Due Process Clause does not require a state to provide its citizens with particular protective services." Citing DeShaney. "Therefore, 'a state's failure to protect an individual against private violence does not violate the Due Process Clause.' At the same time, however, DeShaney noted 'a state may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.' This court has cautioned that the Equal Protection Clause should not be used to make an end-run around the DeShaney principle that there is no constitutional right to state protection for acts carried out by a private actor." Citing McKee_v._City_of_Rockwell, 877 F.2d 409, 413

(5th Cir. 1989), (noting that DeShaney might easily be

circumvented if plaintiffs were allowed to convert 'every due process claim into an equal protection claim, via an allegation that state officers exercised their discretion to act in one situation and not another'." That's at page 304.

I should also note for the record that the plaintiff concedes that to the extent that there is a claim, a viable claim arising out of the children's placement under IDEA, that would come on via 1983. And I note for the record that a motion to amend and supporting brief has been filed and we are awaiting a reply brief and we'll take it up at a later point.

So, to summarize then, the defendants' motion is granted in part and denied in part. The present posture of the case is that there remains a viable Title IX claim for the student on student sexual harassment against the school district. And there remains a defamation claim against defendant Cappabianca. And the court will take up as its earliest opportunity the motion to amend the complaint insofar as it relates to placement.

MR. MARNEN: Point of clarification?

THE COURT: Yes.

MR. MARNEN: I'm a little unclear on this. If the court dismissed the Title IX claim with respect to the

assault --

THE COURT: Yes, if I didn't, I implicitly did. I

am right now on the basis of the concession that was made at oral argument.

THE COURT: All right.

MR. OLDS: Your Honor, if I might, just to avoid making confusion later on and I understand you made your decision. I would just like to point out that we do see the transfer of the girls from a regular school system to an alternative education placement, I mean, I think that would be a classic Title IX case. That if you're a victim of sexual assault, we're going to move you, the female victim, we're going to let the male perpetrators stay in school. I understand we also have this IDEA claim, but I think, I don't know if you mean to say that --

THE COURT: I mean to say that to the extent you are claiming a distinct, you are basing a distinct damage claim for what is an IDEA violation, that your remedy for that is via 1983.

MR. OLDS: Do you also mean to say that a transfer of victims of sexual assault to an alternative education setting could not be discriminatory --

THE COURT: I'm saying that if it's actionable, it's actionable under 1983, okay. Now, we're off the record here.

(Whereupon, at 10:32 a.m., the proceedings were concluded in Courtroom C.)

- - -

C E R T I F I C A T E

I, Ronald J. Bench, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____

Ronald J. Bench

12

13

14

15

16

17

18

19

20

21

22

23

24

25